Supreme Court, U.S.
FILED
NOV 19 1993
OFFICE OF THE CLERK

No. 93-583

In The

Supreme Court of the United States

October Term, 1993

DICARLO CONSTRUCTION COMPANY, and
DELTA EQUIPMENT COMPANY,

Petitioners,

v.

H.H. ROBERTSON CO.,
CUPPLES PRODUCTS DIVISION,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

KEVIN E. GLYNN
Counsel of Record
WILLIAM J. DEBAUCHE
NIEWALD, WALDECK & BROWN
1200 Main Street, Suite 4100
Kansas City, Missouri 64105
(816) 471-7000

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY TO RESPONDENT'S "REASONS WHY THE WRIT SHOULD BE DENIED"

I. This Case Presents Important Procedural Due Process Issues

Respondent illogically argues that because the Court of Appeals mentioned due process principles and suggested that the due process rights were not violated, this Court may not review the Court of Appeals' decision. The situation is not as clear as respondent represents. The Court of Appeals states that due process arguments are irrelevant in the context of equitable post-judgment remedies (Appendix, page 78), yet without further explanation discusses notice issues in the next paragraph (Appendix, pages 78-79). This Court is not foreclosed from reviewing the Court of Appeals' decision. Obviously, this Court often reviews cases in which it disagrees with the decisions of lower courts as to whether due process rights have been violated in particular circumstances.

Respondent makes much of the fact that *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924) was not cited in the lower courts. There was no reason to cite it below. Petitioners had no way of knowing in advance that the Court of Appeals' decision would state that due process arguments are irrelevant (Appendix, page 78). Petitioners had no reason to suspect that this case would involve the fundamental question of the applicability of due process rights in equitable post-judgment collection procedures, or that the Eighth Circuit Court of Appeals would deviate from the decisions of the First, Second, Third and Tenth Circuits mentioned in the Petition for a

Writ of Certiorari. Petitioners argued and preserved due process issues in the lower courts at several points (Appendix, pages 38-44, 57-73, 80-87).

At page 8, respondent misstates petitioners' argument. Petitioners' position is that they should have been named as parties and served as process *after* the judgment was entered against V.S. DiCarlo General Contractors, Inc., during the equitable post-judgment collection procedure.

Respondent states on page 9 that due process was satisfied because petitioners were served with garnishee summonses. Banks and other financial institutions receive garnishee summonses all the time from creditors seeking to discover assets of debtors. The mere fact that DiCarlo Construction Company and Delta Equipment Company received garnishee summonses means nothing without further pleadings under Missouri Rule of Civil Procedure 90.13, which respondent did not follow.

Respondent states on page 9 that the District Court found that the procedure followed in this case was consistent with the hypothetical situation suggested in *Zenith Radio Corp v. Hazeltine Research*, 395 U.S. 100, 111 (1969). The procedure in this case does not follow the hypothetical situation in *Zenith:*

> Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos;* but absent jurisdiction over Hazeltine, that determination would bind only HRI. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction

> over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here. *Id.*, at 111.

This hypothetical does not apply to this case because DiCarlo Construction Company and Delta Equipment Company did not have the opportunity to litigate the alter ego issue before judgment (or after judgment) to present their position.

II. Petitioners' Payment of A Judgment Does Not Render This Case Moot

Respondent incorrectly states that this case may be moot because petitioners have satisfied the judgment. Payment of a judgment does not foreclose an appeal and does not render an appeal moot. *Graddick v. Newman*, 453 U.S. 928, 929 n. (1981); *Elkin v. Fauver*, 969 F.2d 48, 53 n.4 (3rd Cir. 1992), *cert. denied* ___ U.S. ___, 113 S.Ct. 473 (1992); *United States ex rel. Morgan & Son Earth Moving, Inc. v. Timberland Paving & Constr. Co.*, 745 F.2d 595, 598 (9th Cir. 1984).

In the case cited by respondent, *Railroad Co. v. Commissioners*, 98 U.S. 541 (1879), the railroad company voluntarily paid disputed taxes when no judgment had been entered. In contrast, DiCarlo Construction Company and Delta Equipment Company paid and satisfied the judgment only after the Court of Appeals denied their Petition for Rehearing on July 13, 1993, and after both the Court of Appeals and this Court denied their application

for a stay pending review on certiorari. (Respondent's Brief in Opposition, page 6).

Respondent also states that there is no inter-circuit conflict for this Court to resolve because the Court of Appeals for the Eighth Circuit stated that due process had been satisfied. An inter-circuit conflict exists because the Eighth Circuit acknowledged the existence of due process principles, but stated that they are irrelevant to equitable post-judgment remedies (Appendix, page 78), unlike the First, Second, Third and Tenth Circuits, which recognized the applicability of due process to post-judgment collection procedures.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KEVIN E. GLYNN
Counsel of Record
WILLIAM J. DEBAUCHE
NIEWALD, WALDECK & BROWN
1200 Main Street, Suite 4100
Kansas City, Missouri 64105
(816) 471-7000
(816) 474-0872

Counsel for Petitioners